Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1569

THE STATE OF CONNECTICUT,

Petitioner,

v.

PATRICK MENILLO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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The petitioner, The State of Connecticut, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on March 25, 1975.

I. Citation

A decision of the Connecticut Supreme Court, *State* v. *Patrick Menillo*, Vol. XXXVI, No. 39, Conn. L.J. p. 26 (March 25, 1975), a copy of which is annexed hereto. Said decision is reported as *State* v. *Menillo*, —Conn.—, —A.2d—(1975).

II. Jurisdictional Grounds

On March 25, 1975, the Connecticut Supreme Court entered judgment reversing the conviction of Patrick Menillo for the crime of attempting to procure an abortion. The Jurisdiction of this Court is invoked under authority of 28 U.S.C. Section 1257 (3).

III. Questions Sought to be Reviewed

1. Does the defendant, Patrick Menillo, a male person, not licensed to practice medicine or surgery, have the standing to raise the unconstitutionality of the abortion statute as announced in *Roe* v. *Wade*, 410 U.S. 179, *Abele* v. *Markle*, 369 F. Supp. 807 and *State* v. *Sulman*, ——Conn.——?

2. Are the decisions of *Roe* v. *Wade*, 410 U.S. 113 and *Doe* v. *Bolton*, 410 U.S. 179 restricted to the circumstance where an abortion is performed upon an appropriately safeguarded medical judgment?

IV. Constitutional and Statutory Provisions

The State of Connecticut relies upon the following provisions of the Connecticut General Statutes:

"Sec. 53-29 Attempt to procure miscarriage.

Any person who gives or administers to any woman, or advises or causes her to take or use anything, or uses any means, with intent to procure upon her a miscarriage or abortion, unless the same is necessary to preserve her life or that of her unborn child, shall be fined not more than one thousand dollars, or imprisoned in the State Prison not more than five years or both."

V. Statement of the Case

The defendant was tried in the Superior Court of Waterbury on an Information charging two (2) counts of procuring an abortion and one (1) count of manslaughter arising from the second abortion. The jury returned a verdict of guilty on the first count and could not agree on the second abortion and the manslaughter count. The defendant was sentenced to a term of not less than two years nor more than five years on the first count.

During his trial, the State offered evidence that the defendant, who had never had any medical training and was not a physician licensed to practice medicine and surgery in Connecticut, had performed an abortion upon a woman in a motel in Waterbury on the evening of June 2, 1969, for the sum of $400. When the operation was performed the woman was in normal good health, had no discomfort, and was not under the care of a doctor.

VI. Argument of Law

THE DEFENDANT, A MALE AND NOT A PHYSICIAN, HAS NO STANDING TO RAISE THE UNCONSTITUTIONALITY OF SECTION 53-29 AS MANDATED BY THE UNITED STATES SUPREME COURT.

This Court, in *Roe* v. *Wade*, 410 U.S. 113, has held that the Texas abortion statute similar to Connecticut's was unconstitutional. This opinion and a companion case, *Doe* v. *Bolton*, 410 U.S. 179, held that because medical progress now makes abortion operations safe, the woman's right to undergo an abortion by a physician, if the physician's judgment is to perform such an operation, is paramount over the State's right to regulate abortions

in the first trimester of pregnancy. Judge Blackman's plurality opinion was careful to point out that the abortion contemplated was one "according to (a physician's) professional judgment", *Roe* v. *Wade*, 410 U.S. 113, 165, and that the decisions did not operate to bar the State from prohibiting "any abortion by a person who is not a physician." *Roe* v. *Wade, supra*, 410 U.S. 113, 165.

Following the opinions in *Roe* and *Doe*, the United States District Court for the District of Connecticut, upon remand by this Court, 410 U.S. 683, held that in the light of those cases, Section 53-29 of the Connecticut General Statutes was unconstitutional, *Abele* v. *Markle*, 369 F. Supp. 807.

The Connecticut Supreme Court similarly held in the case of a physician convicted of a violation of Section 53-29, whose appeal was pending when *Roe, Doe* and *Abele* were decided.

State v. *Sulman*
——Conn.——
(35 C.L.J. #25, P. 18)

This defendant, an abortionist without medical training and certification, successfully sought to take advantage of these cases and to have his conviction also overturned in the Connecticut Supreme Court.

Since its decision in the *Roe* and *Doe* cases this Court has had occasions, when presented with petitions for certiorari, to pass upon the application of the *Roe* and *Doe* cases to the cases of non-physician abortionists. In *Cheaney* v. *Indiana*, 410 U.S. 991, 36 L Ed. 2d 189, the Court was asked to grant certiorari to a non-physician convicted of a violation of the Indiana abortion statute, very much alike to the Connecticut Statute.

Like the Connecticut statute, the Indiana statute made no exception for licensed physicians and merely prohibited abortions by any person.

Ind. Code 1971, 35-1-58-1
(Ind. Annotated Statutes, Sec. 10-105 (1956 Repl.))

Both the Indiana and Connecticut statutes were noted by this Court to be alike to the Texas statute in the *Roe* case.

Roe v. *Wade*
410 U.S. 113
at page 118, note 2

Cheaney's conviction had been affirmed by the Indiana Supreme Court in *Cheaney* v. *State*, 285 NE 2d 265 prior to the decision of the *Roe* and *Doe* cases. The petition for certiorari, however, was considered after the decisions in the *Roe* and *Doe*.

In denying certiorari, this Court's majority stated:

> "Petition for writ of certiorari to the Supreme Court of Indiana denied for want of standing of Petitioner. *Doremus* v. *Board of Education of Borough of Hawthorne, et al*, 342 U.S. 429, 72 S.Ct. 394, 96 L Ed. 475."

In the *Doremus* case, this Court found that a taxpayer lacked standing or "possession of the requisite financial interest that is, or is threatened to be inured by the unconstitutional conduct." 342 U.S. at page 435.

The *Doremus* case was decided in the light of the general principles of standing that one "who challenges a statute must show that he is within the class of persons with respect to whom

the act is unconstitutional and that the alleged unconstitutional feature in' es him. *Heald* v. *District of Columbia* (1922), 259 U.S. 114, 123."

Annotation 97 L Ed. 481, page 482

In *May* v. *State*, 492 S.W. 2d 888, the Arkansas Supreme Court declined to apply the *Roe* and *Doe* cases to reverse the conviction of a non-physician abortionist on those grounds while ordering a new trial on other grounds. The Arkansas court held that the statute prohibits a layman, who lacks the standing to assert those constitutional claims that pregnant women and licensed physicians may assert, from performing abortions and nothing in the Roe or Doe cases hold this to be unconstitutional.

State v. *May*, *supra*, at page 889

May applied for certiorari to this Court well after the decision in the *Roe* and *Doe* cases, urging application of the *Roe* and *Doe* cases and this Court refused to grant the writ in *May* v. *Arkansas*, ——U.S.——, 38 L Ed. 2d 315.

The defendant, it is clear, has no standing to assert the claims of unconstitutionality, recognized in the *Roe* and *Doe* cases.

> THE DECISIONS OF *ROE* v. *WADE*, U.S. 113 AND *DOE* v. *BOLTON*, 410 U.S. 179 ARE CONFINED TO THE SITUATION WHERE THE ABORTION IS BASED UPON APPROPRIATELY SAFEGUARDED MEDICAL JUDGMENT.

The entire rationale of the *Roe* and *Doe* cases points to the fact that the state abortion statutes were unconstitutional where they prohibited abortion operations by competent and licensed physicians and upon their professional judgment.

Justice Douglas, who concurred in the *Roe* and *Doe* plurality opinions, also concurred in the denial of certiorari in the *Cheaney* case, supra, on these grounds:

> "Mr. Justice Douglas would deny certiorari on the grounds that petitioner, who was convicted of performing an abortion, is not a doctor and that the decisions of this Court in *Roe* v. *Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, and *Doe* v. *Bolton*, 410, U.S. 179, 93 S. Ct. 739, 35 L Ed. 2d 201, were confined to the condition, inter alia, that the abortion, if performed, be based on an appropriately safeguarded medical judgment."

The reading of the opinions in *Roe* and *Doe* and Justice Douglas' concurrence on the *Cheaney* petition, sustains the petitioner's position that the effect of the *Roe* and *Doe* cases is only upon medically directed abortions. Any other reading would do violence to the intent of those who sought the overturning of the abortion laws to make such medically safe operations available to women and to the intent of the justices who decided the *Roe* and *Doe* cases.

Although this Court has granted certiorari and vacated criminal abortion convictions of physicians in a number of cases after the *Roe* and *Doe* cases, it has indicated no such favorable treatment should be accorded non-physician abortionists.

The petitioner argued in the Connecticut Supreme Court that this respondent had no standing to apply the *Roe* and *Doe* cases to his case and that those cases did not control the respondent's case. The Connecticut Supreme Court implicitly found that the respondent did have standing to apply the *Roe* case and citing the *Roe* case, reversed the respondent's conviction.

It is respectfully suggested that the Connecticut Supreme Court misapplied the *Roe* case in reversing the respondent's conviction.

Some states, as Connecticut, have applied the *Roe* and *Doe* cases to non-physician's convictions (Minnesota, *State* v. *Hultgren,* 295 Minn. 299, 204 N.W. 2d 197, Pennsylvania, *Commonwealth* v. *Jackson*, 454 Pa. 429, 312 A2d 13), while other states have upheld laymen's convictions under a similar statute (Michigan, *People* v. *Bricker*, 389 Mich. 527, 208 N.W. 2nd. 172; New Jersey, *State* v. *Norfleet*, (1975), —N. J.—, —A2d—, 17 Cr. L. Rep. 12156).

Thus, it appears that a substantial judicial controversy arising out of this Court's decision would be settled if this Court granted certiorari.

CONCLUSION

For these reasons, A Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Petitioner, State of Connecticut

By S/ Francis M. McDonald

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APPENDIX

Appendix (Opinion and Judgment of Supreme Court of Connecticut.)

SUPREME COURT

February Term, 1975

STATE OF CONNECTICUT v. PATRICK MENILLO

Information charging the defendant with two counts of the crime of attempting to procure an abortion and one count of the crime of manslaughter, brought to the Superior Court for the judicial district of Waterbury and tried to the jury before *Naruk, J.;* verdict and judgment of guilty on the first count of attempting to procure an abortion, from which the defendant appealed to this court. *Error; judgment directed.*

Thomas L. Nadeau, with whom, on the brief, was *Theodore I. Koskoff*, for the appellant (defendant).

Francis M. McDonald, state's attorney, with whom was *Joseph A. Hill*, assistant state's attorney, for the appellee (state).

PER CURIAM. The defendant was tried on an information charging two counts of attempting to procure an abortion and one count of manslaughter arising from one of the attempted abortions charged. The jury returned a verdict of guilty on the first count of attempting to procure an abortion and could not agree on the second count or the manslaughter count. The court declared a mistrial as to those two counts. The defendant has appealed from the judgment rendered on the first count.

On June 2, 1969, the defendant, a non-physician and without any medical training, performed an abortion in a motel room for a fee upon a female in normal good health. From the time of his

arrest to the present, the defendant has claimed that General Statutes § 53-29 under which he was charged and convicted is unconstitutional.

On January 22, 1973, the United States Supreme Court decided the cases of *Roe* v. *Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 and *Doe* v. *Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201, holding the abortion statutes of Texas and the abortion statutes, in part, of Georgia unconstitutional. Thereafter, General Statutes §§ 53-29, 53-30 and 53-31 were declared unconstitutional by the United States District Court for the district of Connecticut upon remand of a previously appealed case. *Abele* v. *Markle*, 369 F. Sup. 807 (D. Conn.). On December 18, 1973, this court followed the mandate of the federal courts in *State* v. *Sulman*, Conn. (35 Conn. L.J., No. 25, p. 18).

The state claims that the unconstitutionality of the state abortion statutes in the *Roe* and *Doe* cases is predicated on the rationale that the statutes prohibited abortion operations by competent and licensed physicians upon their professional judgment. The state refers to *Cheaney* v. *Indiana*, 410 U.S. 991, 93 S. Ct. 1516, 36 L. Ed. 2d 189 where, in denying the petition for a writ of certiorari, Justice Douglas concurred in the denial of certiorari on the grounds that the petitioner was not a physician and that the decisions in *Roe* and *Doe* were confined to the condition that the abortion, if performed, be based on an appropriately safeguarded medical judgment.

In *Roe* v. *Wade*, supra, 155, the Supreme Court stated that where fundamental rights are concerned, regulations limiting these rights may be justified only by a compelling state interest " and that legislative enactments must be narrowly drawn to express only the ligitimate state interests at stake." See also *Kramer* v. *Union Free School District*, 395 U.S. 621, 633, 89 S. Ct. 1886, 23 L. Ed. 2d 583; *Griswold* v. *Connecticut*, 381 U.S. 479, 485, 85 S. Ct. 1678, 14 L. Ed. 2d 510.

The broad language of General Statutes § 53-29[1] is similar to that of the Texas statute which the Supreme Court, because of the fundamental rights involved, declared unconstitutional as a whole and struck down in toto even though it was conceded that statutes tailored to limit the regulations to compelling state interests would be valid and not in violation of constitutional restraints. As Justice Rehnquist points out in his dissent in *Roe*, the statute was struck down as a whole rather than being held unconstitutional as applied to the fact situation before the court as was the previous practice in cases which he cites. *Roe* v. *Wade*, supra, 177-78. Consequently, even though the defendant, as a layman, would certainly be held to answer to an appropriately drawn statute for the attempted abortion performed, General Statutes § 53-29 in its present form cannot meet the test of constitutionality even as applied to the fact situation in this case. In *State* v. *Sulman*, supra, the court ruled that in view of the decisions of the federal courts including that of the United States Supreme Court, General Statutes § 53-29 had to be held unconstitutional in toto. This means that General Statutes § 53-29 as now drawn is null and void, and an offense purportedly created by that statute is not a crime.

There is error and the case is remanded with direction to set aside the judgment and render judgment for the defendant.

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[1]General Statutes § 53-29 proscribes an attempt to procure a miscarriage or abortion by "[a]ny person." The statute makes no exception for medical practitioners.

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The respondent, Patrick Menillo, respectfully prays that the petition for a Writ of Certiorari be denied in that it presents inadequate jurisdictional foundation.

I. CERTIORARI JURISDICTION

Petitioner claims 28 United States Code, Section 1257 (3) to be the bases for this Court's certiorari jurisdiction, which bases, however, do not obtain. The Supreme Court of Connecticut noted that respondent had challenged the constitutionality of Connecticut General Statute, Section 53-29, throughout trial and appeal, *Petitioner's Appendix* at 1a-2a. However, by the time his appeal

was heard, the statute had been declared unconstitutional in toto three times; twice by three-judge federal courts, *Abele v. Markle*, 342 F.Supp. 800 (D. Conn. 1972), *vacated to consider mootness*, 410 U.S. 951,(1973), *upon remand*, 369 F. Supp. 807 (D. Conn. 1973) and once by the Connecticut Supreme Court in *State v. Sulman*, 165 Conn. 556, _____ A.2d. _____ (1973). Therefore, when the *Menillo* appeal was argued, the highest Court of the state had already determined said statute to be unconstitutional in toto. The only "issue" remaining was the effect on Menillo of the prior constitutional holding in *Sulman, supra.*

While "the validity of a State statute [was] drawn in question on the ground of its being repugnant to the Constitution . . . ," 28 U.S.C. 1257(3), and while Menillo claimed his conviction under said statute would and subsequently did violate his constitutional rights, it was unnecessary to reach the former proposition, it having been earlier determined, and the latter was not reached, because the court's decision merely construed the statute invalidated in *Sulman, supra.* Said construction of state law is a function peculiar to the state courts and presents no federal issue, *Wardius v. Oregon*, 412 U.S. 470, 477 (1973); *Grayned v. Rockford*, 408 U.S. 104, 110 (1973); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971); *Groppi v. Wisconsin*, 400 U.S. 505, 507 (1971); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 285 (1961).

II. STANDING

Petitioner's "standing" argument suggests, albeit inadvertently, a further jurisdictional deficiency. Article III, Section 2, Clause 1 of the United States Constitution limits Supreme Court jurisdiction to "cases or controversies." State court jurisdiction is not so limited and whether they may render "advisory" opinions is a matter of state law, *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952). Therefore, whether Menillo had standing to raise the arguments and issues he presented below is a question of state law not subject to review here as long as standing was not wrongfully denied. This United States Supreme Court/state court jurisdictional dichotomy was examined in *Doremus, supra*:

> We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of "case or controversy," we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.

Id. at 434. *See also, Cramp, supra.* As both *Cramp* and *Doremus* indicate, Article III standing before this Court is quite different from standing to litigate in the state courts.

Inasmuch as the Supreme Court of Connecticut implicitly found that Menillo had standing before it, any opinion of this Court that Menillo lacked Article III standing would be merely an advisory opinion which would not affect the decision below. Therefore, this Court is without Article III jurisdiction.

III. SEVERABILITY

Roe v. Wade, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973) and *Abele v. Markle*, 369 F. Supp. 807 (D. Conn. 1973) were held to render the Connecticut

abortion statute unconstitutional in toto in *Sulman*, *supra*. Given the determination of complete unconstitutionality in *Sulman*, involving a physician, *Menillo* presented the Connecticut Supreme Court with the question of whether the "[a]ny person" provision of the abortion statute could be judicially construed to embrace respondent Menillo while exempting physicians. The court, while indicating Menillo's conduct could be constitutionally proscribed by an appropriately narrow statute, determined that the law under which he was prosecuted was not such a statute because it indiscriminately included medical doctors. A state's highest court's construction of its statute is binding on this Court, *Wardius*, *supra* at 477; *Grayned*, *supra* at 110; *Thirty-Seven Photographs*, *supra* at 369; *Groppi*, *supra* at 507; *Cramp*, *supra* at 285. Therefore, Menillo contends that no federal question is presented by the Connecticut Supreme Court's holding that none of the abortion statute survived its ruling in *Sulman*. Whether the unconstitutional proscription of abortion by physicians is severable from a possible constitutional proscription of abortion by lay persons is a question of state law, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), and presents no federal question for review by this Court, *King v. West Virginia*, 216 U.S. 92 (1909).

In light of the above arguments and authorities respondent Patrick Menillo respectfully submits that this Court is without the necessary jurisdictional bases to review by certiorari the case of *State v. Menillo*, under 28 U.S.C. 1257(3).

Respondent, Patrick Menillo

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